Supreme Court, U.S.
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No. 85-1310

In The

Supreme Court of the United States

October Term, 1985

EUGENE duPONT III,

Petitioner,

v.

SOUTHERN NATIONAL BANK OF HOUSTON, TEXAS, TRUSTEE, JOHN H. GARNER, TRUSTEE, EDWARD J. BRADY, TRUSTEE, and EUGENE duPONT IV,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether judgment may be entered against defendants who move for dismissal of the plaintiff's action pursuant to Rule 41(b), where they have not had an opportunity to present their own case?
2. Whether the plaintiff in this case has shown hostility which affects the performance by the Trustees sufficiently to require their removal?
3. Whether the Trustees abused their discretion by allocating litigation expenses in this case to the income account of the Trust?

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COUNTERSTATEMENT OF THE CASE

In this suit, Eugene duPont III ("duPont III"), one of the heirs of the duPont de Nemours fortune, sought to revoke an irrevocable Trust he set up in 1972. DuPont III had married his third wife, Joanne, on August 6, 1970, without signing a prenuptial agreement. Their only child, Eugene duPont IV ("duPont IV"), was born the following March. The marriage was troubled from the outset, and in early 1972, duPont III initiated discussions with Edward J. Brady ("Brady") concerning setting up a trust which would put all of duPont III's assets beyond the reach of Joanne duPont in case of a divorce. At the same time, duPont III wanted to equalize the inheritance of duPont IV, his only son, with that of his sisters, who had been provided for by previous bequests.

On December 14, 1972, duPont III executed the trust document at issue (the "Trust Agreement" or the "Trust"). In 1976, Joanne and Eugene duPont III separated, and in November of 1977, Joanne duPont filed for divorce. In the divorce proceeding, duPont III stated in his deposition and in a sworn financial statement that the assets at issue in this appeal were all owned by the Trust, and that his personal liabilities exceeded his personal assets. The marriage was terminated on October 11, 1978, with Joanne duPont receiving no division, share, or other distribution with regard to the assets at issue in this appeal, based on duPont III's representations that they belonged to the Trust. Furthermore, duPont III was required to pay only $12,000.00 per year child support, although he had an average income from his trusts of over $1.1 million per year. The minor Eugene duPont IV is

not a beneficiary of his father's current will, and no provision has been made for him by his father other than the Trust.

On December 30, 1978, two months after his divorce was final, duPont III married his fourth and present wife, Laura Pate. Thereafter, duPont III began to search for ways to substitute his new wife as a beneficiary of the Trust, or in the alternative, to get some property out of the Trust to give to her. In June of 1981, he filed this suit against Southern National Bank of Houston, Texas, John H. Garner, and Brady, the trustees under the Trust Agreement (the "Trustees"), duPont IV, and the contingent remaindermen.

This case came to trial on November 29, 1982. When duPont III rested his case, the Trustees and duPont IV moved to dismiss, pursuant to Rule 41(b), Federal Rules of Civil Procedure. The district court orally granted the motions, without giving any indication of holding other than against duPont III on all of his claims for relief, and thus in favor of the Trustees and duPont IV on the issue of title to the disputed assets. Ten months later, the district court issued written findings dismissing duPont III's arguments for dissolving the Trust, but holding that the disputed assets, valued at $21.7 million of the total Trust assets of $29.5 million, were not validly transferred to the Trust, and thus belonged to duPont III. The Trustees and duPont IV were never accorded any opportunity to present their own case and testimony on these latter issues.

The Trustees and duPont IV appealed, arguing that judgment could not be entered adverse to defendants under Rule 41(b), and further that even looking only at the evidence presented during the plaintiff duPont III's case,

the defendants were entitled to a judgment dismissing all of the plaintiff's claims under the law of judicial estoppel, equitable estoppel, the real property law of the State of South Carolina, and the partnership law of the State of New York. The court of appeals reversed and remanded for trial the issue of title to the disputed assets, but upheld all other portions of the district court's opinion. *DuPont v. Southern National Bank, et al.*, 771 F.2d 874 (5th Cir. 1985).

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ARGUMENT

I. The court of appeals correctly held that judgment could not be entered adverse to the defendant Trustees and duPont IV before they were allowed to present their case

In the first three points of his Petition for Writ of Certiorari, duPont III complains of the court of appeals' action remanding this cause to the district court in order to allow the defendants to present their evidence. No special or important reason exists for this Court to exercise its discretion to consider this matter, as such action does not conflict with the decisions of any other court or decide any important questions of federal law. Furthermore, any alleged errors can be reviewed in a subsequent appeal after this case has been fully litigated.

As previously noted, the district court granted the defendants' motion to dismiss pursuant to Rule 41(b), Federal Rules of Civil Procedure, at the end of the plaintiff's case, stating:

> THE COURT: Well, as you pointed out, I overruled the [defendants' dismissal] motions prior to trial

> and we held the trial because there were fact questions. I have heard the evidence and find as a fact that the purposes of this Trust have not been frustrated, because I think the purposes of it were accomplished. I don't think we have a situation here other than that, from the evidence. I find as a fact that it is more likely than not true that Mr. DuPont knew exactly what he was doing when he did this and he simply changed his mind, so I am going to grant the motion. We will be in adjournment. (Court adjourned.)

However, the written opinion subsequently issued ten months later effectively gave duPont III most of the relief he desired by gutting the "res" or substance of the Trust.

DuPont III makes the astounding argument that this oral ruling by the district court clearly and unambiguously should have given the Trustees and duPont IV notice that they had lost the majority of their case. As noted by the court of appeals, the defendants would have to have been "clairvoyant" to have anticipated that any part of the subsequent district court opinion would be adverse. *duPont*, 771 F.2d at 880. No reasonable reading of the district court's pronouncement suggests anything other than that the defendants had unequivocally won. DuPont III suggests instead that the lawyers for each of the defendants, all experienced trial counsel, chose not to present any part of their cases, witnesses, or evidence gathered in one-and-one-half years of discovery in this multi-million dollar litigation simply because they "chose to speculate on the outcome of the case by withholding their objection." This suggestion is neither credible nor true.

In his Petition for Certiorari, duPont III argues that the court of appeals opinion conflicts with the requirement

of an objection to preserve error set out in Rule 46, Federal Rules of Civil Procedure, and Rule 103(a), Federal Rules of Evidence. These rules, while in general requiring that objections be made, contemplate that the party has an opportunity to object at the time. Rule 46 expressly provides that "if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him." Where, as found by the court of appeals, the defendants could not have known that there was any reason for them to object, the rule relied upon by duPont III itself excuses any need for an objection to preserve the error. No conflict exists between the court of appeals ruling and these rules or any other authority, and duPont III cites no conflicting decisions whatsoever.

DuPont III also argues that the defendants' due process complaints were not raised until appeal, and thus cannot be considered. In the first place, the court of appeals ruling can be upheld on the basis of the provisions of Rule 41(b) without reference to the Due Process clause. However, it is clear that the defendants raised objection to the district court's action as soon as they found out that it was adverse, thus preserving their right to appeal therefrom. *See* Motion to Amend Findings of Fact and Conclusions of Law, Motion to Amend Judgment, and Motion for New Trial. Where the action a party desires the court to take has been made obvious, formal objection is not necessary. *Stone v. Morris*, 546 F.2d 730, 736 (7th Cir. 1976). Furthermore, the Federal Rules of Evidence and cases by this Court establish that no objection is necessary where fundamental error or clear errors affecting sub-

stantial rights are involved. Rule 103(d), Federal Rules of Evidence; *Hormel v. Helvering,* 312 U.S. 552, 556-57 (1941); *Sibbach v. Wilson & Co.,* 312 U.S. 1 (1941).

Rather than conflicting with any prior decision, the court of appeals' decision in this case merely followed its own precedent. In *Carter v. Morehouse Parish School Board,* 441 F.2d 380 (5th Cir. 1971), *cert. denied,* 404 U.S. 880 (1971), the district court granted the relief sought by the plaintiff and terminated the proceedings before the presentation of the defendant's case. Reversing the lower court in a per curiam opinion, the Fifth Circuit stated:

> It is our opinion that the district court committed error in choosing not to hear the defendant's evidence in rebuttal. Although appellants made no objection to this procedure, they could not reasonably have been expected to do so. The trial court indicated to appellants that his ruling was to be essentially that the test was an insufficient reason for the Board to take the action which it took. This reasoning requires far different evidence for rebuttal and different argument on appeal than the reasoning in the court's final order that, as a matter of fact plaintiff's dismissal was racially motivated. Had appellants known the real basis of the court's proposed ruling, they might well (would undoubtedly) have chosen to offer evidence in rebuttal. A ruling based on evidence which a party has not been allowed to confront or rebut is one which denies due process.

Id., 441 F.2d at 382.

DuPont III strains to avoid the application of this precedent by arguing that in *Carter* the court's oral and written rulings were directly contradictory, while in the instant case they were not. As argued above, however, the district court's oral and written rulings in this case are

clearly contradictory unless an unreasonable, "clairvoyant" interpretation is employed. Secondly, duPont III argues that the defendant in *Carter* took affirmative steps to clarify the court's ruling. Again, no such clarification seemed reasonably necessary at the time of the district court's ruling in this case. The district court adjourned the trial, and duPont III does not suggest whether defendants should have continued to present evidence in an empty courtroom, or instead run down the hall after the Court to do so.

Finally, duPont III argues that in *Carter* no evidence had been presented, while "substantial evidence" has been presented in the present case, and only cumulative evidence remained. This representation is flatly wrong. Defendant Brady's pretrial Exhibits 1-10, 12-15 and 18-33 were never offered into evidence. Defendants' witnesses Joanne A. duPont, Edward Turley, Thomas N. Crowell, Thad T. Hucheson, Charles B. Updike, James H. Cook, George D. Solter, Robert B. Barnhouse, Ford Hubbard and George Etter, all of whom were listed in the defendants' pre-trial orders, never testified. Further, the Trustees and duPont IV reserved questions to be asked of their own witnesses who were called by plaintiff until the defense case, which was never presented.

Finally, duPont III makes the argument that a court may enter judgment *sua sponte* against the moving party under Rule 41(b). No authority is cited for this proposition, no case has ever so held, and the language of the rule itself is to the contrary. Instead, duPont III analogizes to cases where summary judgment can be entered *sua sponte* against the moving party. Obviously, there is a critical distinction between a motion for summary judg-

ment and a motion for dismissal, namely, that both parties are allowed to submit evidence on summary judgment, while only the plaintiff's evidence is considered on a motion to dismiss. While a formal motion for summary judgment might not be necessary if both parties have placed their evidence before the court, such is not the case here. A court may not grant judgment against a party *sua sponte* without ever having heard that party's evidence or arguments.

II. The court of appeals correctly held that the Trustees could not be removed at the sole option of duPont III

DuPont III recognizes that institution of litigation, while usually affecting the relationship between a trustee and beneficiary, does not alone justify removal of the trustee—otherwise, any beneficiary could compel removal of any trustee simply by filing suit. Rather, he argues that litigation was only a part of the existing hostility in this case, and that the court of appeals opinion would prevent removal whenever litigation is in any way involved.

The court of appeals made no such blanket declaration, instead holding only that there was evidence to support the district court's finding of fact that in the present case there was insufficient evidence of hostility to remove the Trustees. This holding does not conflict with *Akin v. Dahl*, 661 S.W.2d 911 (Tex. 1983), where the Texas Supreme Court held that there must be a finding that the hostility affects the trustee's performance. *Akin*, 661 S.W.2d at 914. DuPont III testified at trial that he and Brady (one of the Trustees) are still friends and that with regard to the potential tax consequences, he harbors no hard feelings

because "anyone can make a mistake." Additionally, the record does not contain evidence that the Trustees have failed to provide beneficial services to the Trust. The only evidence cited by duPont in support of removal are disputes as to proper calculation of trustees' fees, a point readily conceded by the Trustees when discovered, and as to alleged mismanagement of assets, a charge yet to be established. While this evidence may indicate some differences of opinion, a trustee is expected to exercise independent judgment and not be a mere puppet. As was evident to the district court and the court of appeals, the disagreements between the Trustees and duPont III resulted from the Trustees' refusal to accede to duPont III's demands that the Trust be improperly modified after the fact. This ruling was merely an application of the evidence in this case to a general proposition of law, and does not present any questions of import to his Court.

III. The court of appeals correctly held that litigation expenses were allocable to the Trust's income interest

Both lower courts held that the allocation of litigation expenses was a matter within the Trustees' discretion, and would only be reviewed for abuse of discretion. While duPont III now claims in his brief that it was his intent as settlor to have a regular income stream from the Trust, absolutely no evidence to this effect was introduced at trial or is cited in duPont III's Petition. In fact, all of the evidence introduced at trial requires a presumption to the contrary concerning duPont III's intent, because his frequent protestations that the Trust was set up to avoid gift and estate taxes could only be effectuated if there was no

formal or informal understanding with the Trustees regarding distribution of income to him. 26 U.S.C. 2036(a)(1); *Skinner's Estate v. U.S.*, 197 F.Supp. 726 (E.D. Pa. 1961), *aff'd*, 316 F.2d 517 (3rd Cir. 1963). Furthermore, his intent must be determined from the Trust Agreement itself, which expressly provides that decisions as to charging expenses to income or principal are within the discretion of the Trustees. *DuPont*, 771 F.2d at 886.

Section 36 of the Texas Trust Act follows the Uniform Principal and Income Act in providing that "[a]ll other expenses, including . . . attorney's fees and other costs incurred in maintaining or defending any action to protect the trust or the property or assure the title thereof, *unless due to the fault or cause of the tenant*, . . . shall be paid out of principal." Tex.Rev.Civ.Stat. art. 7425b-36 (emphasis added). The attorneys' fees at issue were incurred due to the cause of duPont III, who brought the claims against the Trust in the present action, as well as in duplicative proceedings in South Carolina covering the same issues and the same parties. Both suits were brought by duPont III to void the Trust or remove some of its assets. In both actions, duPont III alone will benefit by recovering the assets if he is successful, and no one other than he has any expectation of benefit from these suits.

Obviously, a decision to charge the income account *exactly* as prescribed by the state statutory principles cannot be an arbitrary one. Under these circumstances it cannot reasonably be argued that the district court was clearly erroneous in concluding that the Trustees did not arbitrarily abuse the discretion which the Trust placed in their hands. This ruling again is merely an application of the

evidence in this case to a general proposition of law, and does not present any questions of import to his Court.

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CONCLUSION

The Trustees and duPont IV believe that the evidence presented by duPont III establishes that he is judicially and equitably estopped from claiming title to the assets at issue in this appeal. Furthermore, the Trustees and duPont IV believe that the real property law of the State of South Carolina and the partnership law of the State of New York also require a finding that these assets belong to the Trust. While the Trustees and duPont IV thus disagree with the court of appeals' decision in not making these findings as a matter of law, such matters can be more quickly and fully determined in the remand of those aspects of this case to trial in the district court, rather than taking them up before this Court. However, should this Court be inclined to grant duPont's Petition for Writ of Certiorari, the Trustees and duPont IV respectfully request that their points of appeal denied by the court of appeals also be considered by this Court, as they provide independent state grounds for reversing the district court's judgment.

For the foregoing reasons, duPont III's Petition for Writ of Certiorari should be in all respects denied.

Respectfully submitted.

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